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Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES INCORPORATED,
Petitioners,

v.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ASA D. SOKOLOW
SYDNEY M. KAYE
PHILIP MANDELKER
575 Madison Avenue
New York, New York 10022

HARRY R. OLSSON, JR.
51 W. 52 Street
New York, New York 10022
Attorneys for Petitioner Columbia Broadcasting System, Inc.

CHARLES H. MILLER
ROYAL E. BLAKEMAN
BERTRAND H. WEIDBERG
430 Park Avenue
New York, New York 10022
Attorneys for Petitioner Calvada Productions

EUGENE Z. DUBOSE
ALFRED C. MORAN
120 Broadway
New York, New York 10005
Attorneys for Petitioner Jack Chertok Television, Inc.

SEYMOUR GRAUBARD
345 Park Avenue
New York, New York 10022
Attorney for Petitioner Dena Pictures, Incorporated

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Respondents.

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Columbia Broadcasting System, Inc. ("CBS"), Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures Incorporated (hereinafter "plaintiffs") conditionally petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 8, 1973 to the extent that it affirms in part the judgment entered on June 27, 1972 by the United States District Court for the Southern District of New York. The part of the judgment which plaintiffs conditionally bring to the Court's attention in this petition has resulted in the dismissal of plaintiffs' claims of copyright infringement insofar as they were based on the function of Teleprompter Corporation and Conley Electronics Corporation (hereinafter "Teleprompter") as a program

originator, seller of advertising for transmission by their cable television stations, and a cable television network operator.

This petition is conditioned on the Court's granting Teleprompter's petition in No. 72-1628. Plaintiffs are opposing the said Teleprompter petition. However, if this matter is to be reviewed to the Supreme Court, then we respectfully submit that all of the issues should be presented to the Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at —— F. 2d ——, 177 U. S. P. Q. 225 (2d Cir. 1973) and is annexed hereto as Appendix A, *infra* pp. 1a-28a. The opinion of the United States District Court for the Southern District of New York is reported at —— F. Supp. ——, 173 U. S. P. Q. 778 (S. D. N. Y. 1972) and is annexed hereto as Appendix B *infra* pp. 1b-26b.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in holding that the unauthorized retransmission by Teleprompter's cable television stations of plaintiffs' copyrighted works was not an infringement of the copyrights of those works in violation

*Neither of the opinions is as yet officially reported. References to them will be to the Appendix to this petition. References to the record below will be to that part of the record certified by the clerk of the Second Circuit, *i.e.* the Joint Appendix and Joint Exhibit volumes prepared by the parties and filed with the Court. References denominated "J. A." are to the joint appendix. References preceded by "E" are to the joint exhibit volume.

of Section 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. § 1(c) and (d), when the said cable stations performed all or some of the functions described below:

(a) origination of programming;

(b) sale of advertising for transmission by its cable stations;

(c) interconnection with other cable television stations to form a cable television network.

STATUTE INVOLVED

Section 1(c) and (d) of the Copyright Act, 17 U. S. C. § 1(c) and (d), provide:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize, the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method by exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever * * * and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any

manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever * * *."

STATEMENT

A. *Facts.*

This is an action for copyright infringement commenced on December 11, 1964 and supplemented by complaints filed on December 15, 1969 and May 17, 1971. Plaintiffs are creators and producers of television programs which were protected by statutory copyright and which were initially licensed for transmission by the CBS Television Network, a Division of CBS, to its affiliated television stations for simultaneous broadcast by those stations to viewers in their service area ("network programs"). Some of the copyright works described in the complaints were subsequently "syndicated," *i.e.* licensed by the copyright owners or their licensed distributors to individual television stations for further broadcast to viewers in their service areas.

Teleprompter is the nation's largest operator of cable television stations. At the time of trial, it owned and operated some 100 cable television stations throughout the country with more than 500,000 paying subscribers.* The complaints alleged that the Teleprompter cable television stations had intercepted the signals of television stations

*Teleprompter cable systems are presently serving some 780,000 subscribers. *Broadcasting* April 30, 1973 at p. 56 (Citing Teleprompter Corp.'s first quarter report for 1973).

broadcasting plaintiffs' copyrighted works and then retransmitted both the network and syndicated programs to their paying subscribers, without authorization or license, thereby infringing plaintiffs' copyrights.

At the time of the filing of the original complaint there was pending in the United States District Court for the Southern District of New York the case of *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S. D. N. Y. 1966), *aff'd*, 377 F. 2d 872 (2d Cir. 1967), *rev'd*, 392 U. S. 390 (1968) (hereinafter *"Fortnightly"*). That was the first case to test the copyright liability of traditional CATV systems, the sole function of which was to enhance the reception by television viewers of the signals of nearby television stations.

The District Court in *Fortnightly* found that the CATV systems described therein infringed plaintiff's copyrights, basing its decision in large part upon its analysis of the technical and engineering aspects of the defendants' systems. 392 U. S. at 399 n. 27. On appeal, the Second Circuit in that case affirmed the finding of infringement, basing its decision largely on the quantitative and qualitative contributions which the Fortnightly systems made to bring about the viewing of the copyrighted works. *Id.* at 396.*

A divided Supreme Court reversed, holding *inter alia* that the issue of copyright infringement depended upon "a determination of the function" that a particular cable television system plays "in the total process of television broadcasting and reception." *Id.* at 397. The Court, characterizing Fortnightly's overall function as that of a mere reception service—a passive beneficiary—, determined that

*While *Fortnightly* was on appeal, counsel for the parties in this case voluntarily stayed proceedings herein in order to avoid an unnecessary burden on the courts.

the Fortnightly CATV systems were "on the viewer's side of the line" and thus did not infringe. *Id.* at 399.*

After *Fortnightly*, pre-trial proceedings resumed in this case. The bulk of the basic facts pertaining to the function of the Teleprompter systems was stipulated by the parties.

These stipulations established that the Teleprompter cable television stations performed significant new functions which were not performed by the Fortnightly systems. Thus, the courts below found that the Teleprompter cable television stations selected and imported for retransmission programs broadcast in the first instance by television stations in markets far distant from the communities in which defendants' cable television stations operated, originated substantial programming, sold advertising, interconnected with other cable television stations, and transmitted television signals over-the-air. These functions were in addition to the reception service which enhanced the ability of subscribers to receive the signals broadcast by television stations in local and adjacent markets.** (App. A at 5a-10a, 15a, 16a; App. B at 6b-13b.) The courts below also found that all of the various services offered by the Teleprompter stations were sold as a package, that no one of their services was available independent of the others. (App. A at 13a; App. B at 13b, 24b.)

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*For a more detailed discussion of *Fortnightly* see *infra* at pp. 10-14.

**In order to expedite the resolution of the legal issues, plaintiffs, although their complaints alleged infringement by all of the Teleprompter cable television stations which received and retransmitted plaintiffs' copyrighted works, acquiesced in defendants' insistence that only the functional facts with respect to the five Teleprompter stations specifically named in the complaints be stipulated to and the subject of proof at trial. It was agreed that these were to be used as "illustrative" examples and they were so recognized by the District Court. (App. B at 3b.) Each of the illustrative cable television stations performed functions substantially different from those performed by the CATV systems involved in *Fortnightly*. None of them provided solely or primarily a mere reception service.

On the basis of these facts, plaintiffs contended at trial that the Teleprompter cable television stations functioned not as mere passive beneficiaries, but were fully and functionally equivalent to "broadcasters" and, accordingly, could not consistently with the *Fortnightly* test be deemed to fall "on the viewers' side of the line" for purposes of copyright liability.

B. *Decisions Below.*

The District Court agreed with the plaintiffs that *Fortnightly* was not on its face dispositive of the issues before it. The Court noted that "[p]rogress in the CATV industry" and certain novel and "specific differences between defendants' CATVs and those in *Fortnightly*" made this case "the inevitable sequel to [*Fortnightly*]." (App. B at 2b.) But notwithstanding this conclusion, the District Court held that the result in *Fortnightly* was controlling in every respect in the present action. (App. B at 25b-26b.) Accordingly, it dismissed the complaints.

On appeal, the Second Circuit in an unanimous opinion recognized that the question was

> "whether the character of CATV is so changed by additional services that the cable systems here have undertaken that their total operation, including the reception service, under the *Fortnightly* functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to 'perform' the broadcast programming that they distribute." (App. A at 12a.)

Having thus initially formulated the issue, in light of *Fortnightly*, as an analysis of the "total operation" of the Teleprompter cable stations the Court of Appeals, however, undertook only a consideration of "the effect of *each* of

these operations [not previously considered] on the application of the *Fortnightly* doctrine to the CATV systems involved." (App. A at 12a.) (Emphasis added.)

Its analysis led the Court of Appeals properly to reverse the judgment of the District Court with respect to Teleprompter's activities in selection, importation and distribution of television signals embodying plaintiffs' copyrighted works from distant broadcast stations located many, in some cases hundreds of, miles from the communities served by its cable television stations and clearly beyond the service areas of those stations—functions admittedly not before the Supreme Court in *Fortnightly*.* The Second Circuit held that cable television stations to the extent that they import such "distant" signals are "functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals" within the meaning of *Fortnightly* and of the Copyright Act. (App. A at 18a.)**

On the other hand, its analysis led the Court of Appeals to conclude, improperly we contend, that in and of themselves neither the origination of programming by the Teleprompter stations nor sale of advertising on such programming should alter the result of *Fortnightly*. (App. A at 12a-15a.) The Second Circuit following the District Court's lead glossed over the importance of interconnection because of "the minimal interconnection" evidence before it.

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*Cable system counsel in *Fortnightly*, who represent Teleprompter here, stated in a brief to this Court that the systems involved in *Fortnightly* were "in the service area" of the transmitting stations and that the importation of programs from distant markets was "not involved in this [*Fortnightly*] case." Petitioner's Reply Brief, March 5, 1968, pp. 1-2.

**Plaintiffs will present a fuller analysis of the Second Circuit's approach to the distant signal question in their opposition to Teleprompter's Petition for a Writ of Certiorari.

(App. A at 15a-16a.)* The Court of Appeals chose not to consider the effect of the overall operation of the Teleprompter cable stations as functioning entities and whether such overall operation would put them on the broadcaster's "side of the line" within the meaning of *Fortnightly*.

REASONS FOR GRANTING THE WRIT

It is the understanding of plaintiffs** that Teleprompter is filing a petition for certiorari whch challenges the Court of Appeals' decision insofar as it holds that cable television stations when "distributing [television] signals that are beyond the range of local antennas . . . 'perform' the programming distributed to subscribers on these imported signals. . . ." (App. A at 18a.) Plaintiffs believe that holding is correct and will in a brief in opposition oppose the review that they expect will be requested by the Teleprompter petition.

If, however, this Court should grant that petition, plaintiffs believe that the issues with respect to program origination, sale and transmission of advertising, and interconnecton, by the Teleprompter cable stations are so interrelated functionally with the issues which will necessarily be raised in the Teleprompter petition that the Court should review the entire issue of function.

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*With respect to the use of microwave to transmit various signals to and within a cable system, the Court of Appeals held that such does not in and of itself make the cable system functionally equivalent to a broadcaster. (App. A at 16a-17a.)

**Given the fact that Rule 22 of this Court requires that a cross-petition be filed within the same period of time as a petition, plaintiffs are not certain, at the time this is written, of the position that Teleprompter will take.

A. *The Court of Appeals in Partially Affirming the District Court Did Not Properly Apply the Functional Test of* Fortnightly.

Cable television in this country is only some 20 years old. The *Fortnightly* case, though before this Court in 1968, was originally instituted in 1960 and the factual record included even earlier material. As a result this Court in its opinion dealt only with questions concerning the copyright liability of a CATV system which functioned merely as a well-located antenna and which only improved reception of nearby television stations. 392 U. S. at 392.

Since 1960, however, the cable television industry has undergone a "revolution" and "transformation in purpose, scope and expectation." This was readily acknowledged by Teleprompter executives before trial. (*E.g.*, J. A. 582a-584a, E-62.) The revolution was not in the development of new devices to improve television reception for persons living in mountain valleys or rough terrain; the revolution involved a change in *function*. Modern cable television stations no longer act merely as reception-aiding devices. They perform, rather, the functions of traditional "broadcasters," deliberately selecting and importing programs from distant stations, originating its own programs, selling advertising, and connecting into networks. With this revolution in function, the cable television industry has experienced "explosive" growth. *See, e.g., United States* v. *Midwest Video Corp.*, 406 U. S. 649, 651 (1972) and *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 163-164 (1968). Indeed, since 1968 when *Fortnightly* was decided the CATV subscriber figures have grown from 2.8 million homes to more than 7 million homes. *Television Digest*, Vol. 13 No. 17, Apr. 23, 1973, at p. 5.

At the time *Fortnightly* was before this Court, *amici* made the Court aware of the fact that some cable television

stations performed functions far different than those performed by the *Fortnightly* systems. Counsel for *Fortnightly*, however, urged the Court to limit its decision to the particular CATV systems before it and not to consider the issue of other cable television stations which originated programming, sold advertising, interconnected into cable television networks, and imported and distributed distant broadcast programming by microwave.*

This Court limited its opinion accordingly. In a footnote at the very beginning of the opinion, the Court observed: "Some CATV systems, about 10%, originate some of their own programs. We do not deal with such systems in this opinion." 392 U. S. at 392 n. 6. Further on, the Court noted that "While we speak in this opinion generally of CATV, we necessarily do so with reference to the facts of this case." *Id.* at 399 n. 25.

Thus, this Court explicitly reserved judgment on the issue of copyright liability on the part of cable television stations which originate programming and perform such other functions as sale of advertising, interconnection into cable television networks, and the importation of programs from distant television stations. These are all functions that are performed by the Teleprompter stations involved in the present action and they are all functions which are of growing importance in an industry of explosive growth. Moreover, importation of programs from distant television stations drastically interferes with the copyright owners' ability to seek future revenues from syndication. Such

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*E.g., Fortnightly's counsel, who also represent Teleprompter here, emphasized that this Court's decision "must necessarily rest on the facts concerning the operation of petitioner's community antenna television systems and not on possible or theoretical operations of some CATV system in the future." Petitioner's Reply Brief, March 5, 1968, pp. 1-2.

importation also provides an inducement for subscribers to accept the Teleprompter package; having thus attracted subscribers, program origination in substantial amounts by Teleprompter has the inevitable effect of diluting the broadcaster's audience and thus further reducing the income of copyright owners.

Clearly, this Court in *Fortnightly* did not decide the question of the effect of a cable television station's origination, interconnection and sale of advertising on its copyright liability. However, the Court did posit a test by which it was to be determined whether or not cable television systems would be liable under the Copyright Act of 1909 for their use of broadcast television programs.

Analogizing to the influence of "drastic technological change" on the concept of "performance" within the meaning of the Copyright Act, this Court in *Fortnightly*, 392 U. S. at 395-399, stated that the resolution of the issue of whether or not cable television systems "performed" depended "upon a determination of the function that CATV plays in the total process of television broadcasting and reception," *id.* at 397: where a CATV considered "in this framework . . . falls on the viewer's side of the line" it does not "perform." *Id.* at 399. The distinction rests upon a determination of whether the cable system is more akin to an "active performer" or to a "passive beneficiary." *Id.*

A "broadcaster" according to this Court in *Fortnightly*: (i) "selects and procures the program to be viewed, [which he] may produce . . . himself, whether 'live' or with film or tape, or he may obtain . . . from a network or some other source"; (ii) converts the images and sounds into electronic signals and transmits them to the public, unless of course "the broadcaster obtains his program from a network [in which case] he receives the electronic signals

directly or by means of telephone lines or microwave." *Id.* at 397; see *id.* at 400. Viewers, on the other hand, merely "receive the broadcaster's signals," *Id.* at 401. A "broadcaster" is also engaged in the business of selling its time and facilities to sponsors and is concerned with program content and arrangement. *Id.* at 400 n. 28.

The Fortnightly systems, the Court found: (i) did not "select the programs to be viewed," they simply carried "whatever programs they received;" (ii) did not "procure programs and propagate them to the public," they merely "receive programs that have been released to the public;" and (iii) had "nothing to do with sponsors, program content or arrangement," but only sold an " 'antenna service to a segment of the public for which [broadcasters'] programs were intended but which is not able because of location or topographical condition, to receive them without rebroadcast or other relay service by community antenna. . . .' " *Id.* at 400 (brackets in original).

Thus, the Court held that the Fortnightly systems as functioning entities were merely "passive beneficiaries" when analyzed in light of the traditional functions of broadcasters and viewers. The Court did not hold, however, that all cable stations, regardless of the functions they perform, were television "viewers," mere "passive beneficiaries," or "on the viewer's side of the line." Rather it established a test for the question of whether the activities of any particular cable television station constitute a performance within the meaning of the Copyright Act. This test requires the courts to analyze whether the activities of a particular cable station as a functioning entity are more akin to a broadcaster than to a viewer and so constitute a performance within the meaning of the Act.

This was the test that the Court of Appeals below set forth when it stated that the question before it was whether

the Teleprompter cable stations' "total operation, including the reception service, under the Fortnightly functional test [has] become functionally equivalent to [that] of a broadcaster, and thus these systems should be deemed to 'perform' the broadcast programming that they distribute." (App. A at 12a.)

As noted *supra* at 8-9, however, the Court of Appeals apparently found it unnecessary to consider the Teleprompter stations as "total operation[s]," to see whether as "total operation[s]" they were "functionally equivalent to . . . a broadcaster." Rather, the Court of Appeals considered only the separate effect of each of the various functions performed by the Teleprompter stations. As individual functions, the Second Circuit held that none of them, except the importation of distant signals, had any effect whatsoever on defendants' liability for the performance of plaintiff's copyrighted works initially broadcast by over-the-air television stations.

The question, however, both under *Fortnightly* and under the test as set down at the outset of the Second Circuit's opinion below is not the effect of any single function performed by a cable television station on the broadcast programming it replays. The question is rather whether the cable station in its "total operation" is "functionally equivalent to a broadcaster" and thus is a performer within the meaning of the Copyright Act. In affirming the District Court's dismissal of plaintiffs' causes of action to the extent they were based on the effects of Teleprompter's overall operations, the Court of Appeals did not answer that question.

If the Second Circuit had addressed itself to the pertinent question of the cable stations' overall operations and had analyzed in light of *Fortnightly* the Teleprompter cable television stations as functioning entities, it should have

concluded that the stations were "functionally equivalent to a broadcaster" and thus deemed to have " 'perform[ed]' the broadcast programming that they distribute."

The Teleprompter stations performed every operation that this Court in *Fortnightly* identified as characteristic of a broadcaster. See 392 U. S. at 397, 400. The Teleprompter cable television stations originated their own programming.* Indeed, the Teleprompter station in New York City originated in 1971 some 70 hours of programming a week, more than the average of the three large New York City network-owned television stations, and as much or more than any television affiliate in the country (J. A. 454a-455a, E-250). They selected the programs to be viewed, both the programs they originated and those programs embodied in the broadcasts they chose to import from hundreds of miles away.** They procured and distributed the programs, with the aid of intricate microwave hookups up to 1,300 miles long and multipoint microwave systems by means of which they could reach every home in an area within a radius of some twenty miles. (See, *e.g.*, J. A. 117a, 269a-271a, 319a-322a, E-36-37, E-151-152). They were formed into networks.*** And they sold advertising time to sponsors. Plaintiffs' evidence also showed that the commercials sold and carried by Teleprompter stations were identical to those on broad-

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*A majority of this very Court has already expressed the view that insofar as cable stations originate and distribute their own programming, they are the equivalent of broadcasters. *United States* v. *Midwest Video Corp.*, 406 U. S. 649, 667-670, 677, 680-681 (1972) (Brennan Opinion, Douglas Opinion).

**In deciding to bring Los Angeles signals to Farmington, New Mexico, for example, Teleprompter chose to bypass some 113 other stations as far away or nearer. Based on information in *Television Fact Book*, Vol. 41 (1971-72).

***As noted *supra* at 8-9, both the Court of Appeals and the District Court chose not to consider Teleprompter's networking activities on the grounds that there were only a very few instances of

cast television stations and served the same economic function. (J. A. 286a, E-54-55, E-179-181, E-236-241.)*

As well as being technologically intertwined these functions were economically inseparable. The courts below recognized that the various services, origination, interconnection, advertising, importation, and reception, were all offered and sold by the Teleprompter stations to the public in "combination." The services were advertised and sold "as a package." Nobody bought or could buy any one service "without the other." (App. A at 13a; App. B at 13b, 24b.)

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interconnection on the record. (App. A at 15a-16a; App. B at 16b.) Such a conclusion merely invites further litigation. Moreover, the reason that there were relatively few examples of interconnection in the record is that plaintiffs' proof was presented with respect to only five illustrative systems in order to expedite pre-trial proceedings and the trial itself. Notwithstanding such limitation the record contained ample evidence concerning Teleprompter's capability and plans to interconnect its own and other cable stations into a national network. (J. A. 258a-259a, 280a, E-30, E-34.) Steps to implement this plan had already been taken by the time of trial. (J. A. 602a, E-574-577, E-38, E-212, E-752-753, E-29, E-589.) Plans for a national satellite-connected cable network are proceeding apace. See *Broadcasting*, March 19, 1973 at pp. 114-116. Moreover, in interconnecting as they did the Teleprompter cable stations were shown to be functionally equivalent to network affiliate stations. (J. A. 298a-299a, 378a, 401a, 411a.)

*The District Court below, App. B at 17b, disregarded Teleprompter's activities in the sale of commercials on the ground that at present such activities were "small." However, the issue was raised as a test issue and such a conclusion was accordingly irrelevant and merely invited further litigation. One reason why more evidence was not adduced was that plaintiffs simplified the issues at trial by limiting their proof to five *illustrative* systems. Secondly, the decision of cable stations to sell advertising was a relatively new policy adopted by Teleprompter in response to proliferation of origination and importation functions. (J. A. 576a-577a.) Further, there was evidence that during the pendency of this case, Teleprompter stations outside of New York City were specifically instructed by corporate headquarters not to carry commercials. (J. A. 538a-539a, 554a-555a.)

Based on these facts, numerous witnesses familiar with both the broadcasting and cable industries described at trial the Teleprompter cable television stations as functionally equivalent to broadcasters. (J. A. 298a-299a, 322a-323a, 326a-327a, 373a,379a, 400a-402a, 413a.)

In such circumstances, it is clear that the Court of Appeals, as the District Court before it, erred in extending to cable stations performing these functions the limited immunity granted by *Fortnightly* to those CATV systems performing only a local reception service and that in so doing the Court of Appeals decided certain of the issues before it in such a way as to conflict with the *Fortnightly* decision of this Court.

B. *Before Assessing Teleprompter's Activities In Distant Signal Importation the Court Should have Before It for Consideration All the Facts of Teleprompter's Operations.*

Plaintiffs are of the view that, should Teleprompter's petition for certiorari be granted, then the facts and issues presented herein should be simultaneously before the Court. This is necessitated by the very test laid down by the Court in *Fortnightly* and discussed at length *supra* at 12-14.

The Court in *Fortnightly* had before it a question concerning the applicability of the Copyright Act to the *Fortnightly* CATV systems. To resolve that question the Court analyzed the two systems then before it in light of the total economic and technological context in which they operated. It was only in light of such an analysis that the Court reached its descision.

Plaintiffs have shown that since the factual record of *Fortnightly* was closed, the cable television industry has been revolutionized. See *supra* at 10-11. The courts below so

found. In view of the test for copyright liability set forth in *Fortnightly*, this Court, therefore, before attempting to assess the import of one aspect of the function of the Teleprompter cable television stations, should have before it a record which presents the full economic and technological context in which those stations operate.

CONCLUSION

If Teleprompter's petition, which we assume will raise a question with respect to only one aspect of Teleprompter's operations, is granted with no more, this Court will be deciding an issue of great complexity with only a portion of the record before it. If the Court reviews at all, then to ensure full and fair consideration the Court should also review the facts and issues set forth by plaintiffs herein.

Plaintiffs urge that in the event that Teleprompter's petition in No. 73-1628 is granted, this conditional petition for a writ of certiorari should also be granted.

Respectively submitted,

ASA D. SOKOLOW
SYDNEY M. KAYE
PHILIP MANDELKER
575 Madison Avenue
New York, New York 10022

HARRY R. OLSSON, JR.
51 W. 52 Street
New York, New York 10019
Attorneys for Petitioner
Columbia Broadcasting
System, Inc.

CHARLES H. MILLER
ROYAL E. BLAKEMAN
BERTRAND H. WEIDBERG
430 Park Avenue
New York, New York 10022
Attorneys for Petitioner
Calvada Productions

EUGENE Z. DUBOSE
ALFRED C. MORAN
120 Broadway
New York, New York 10005
Attorneys for Petitioner
Jack Chertok Television, Inc.

SEYMOUR GRAUBARD
345 Park Avenue
New York, New York 10022
Attorney for Petitioner
Dena Pictures, Incorporated

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022

MARSHALL, BRATTER, GREENE, ALLISON
& TUCKER
430 Park Avenue
New York, New York 10022

ALEXANDER & GREEN
120 Broadway
New York, New York 10005

GRAUBARD, MOSKOVITZ, MCGOLDRICK,
DANNETT & HOROWITZ
345 Park Avenue
New York, New York 10022
Of Counsel

June 5, 1970

APPENDIX A

Court of Appeals, Second Circuit

COLUMBIA BROADCASTING SYSTEM, INC., et al. v. TELEPROMPTER CORPORATION et al.

No. 72-1800 Decided Mar. 8, 1973

Appeal from District Court for Southern District of New York, Motley, J.; 173 USPQ 778.

Action by Columbia Broadcasting System, Inc., Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Incorporated, against Teleprompter Corporation and Conley Electronics Corporation for copyright infringement. From judgment dismissing complaints, plaintiffs appeal. Modified.

See also 148 USPQ 417.

ASA D. SOKOLOW and SEYMOUR GRAUBARD, both of New York, N. Y., for appellants.

ROSENMAN, COLIN, KAYE, PETSCHEK, FREUND & EMIL, New York, N. Y., for Columbia Broadcasting System, Inc.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, New York, N. Y., for Calvada Productions.

ALEXANDER & GREENE, New York, N. Y., for Jack Chertok Television, Inc.

GRAUBARD, MOSKOVITZ, MCGOLDRICK, DANNETT & HOROWITZ, New York, N. Y., for Dena Pictures, Incorporated.

ROBERT C. BARNARD, JULIUS LEVY, CLEARY, GOTTLIEB, STEEN & HAMILTON, R. MICHAEL DUNCAN, KATZ, ROSENSWEIG & SINDLE, and DAVID Z. ROSENSWEIG, all of New York, N. Y., for appellees.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, HERMAN FINKELSTEIN, SIMON H. RIFKIND, JAY H. TOPKIS, and PAUL L. LASKIN, all of New York, N. Y., for American Society of Composers, Authors and Publishers, amicus curiae.

STUART F. FELDSTEIN, CHARLES S. WALSH, and STEPHEN A. GOLD, all of Washington, D. C., for National Cable Television Association, Inc., amicus curiae.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, LOUIS NIZER, GERALD MEYER, and GERALD F. PHILLIPS, all of New York, N. Y., for Motion Picture Association of America et al., amici curiae.

Before LUMBARDO, KAUFMAN, and MANSFIELD, Circuit Judges.

LUMBARD, Circuit Judge.

Plaintiffs-appellants, Columbia Broadcasting System, Inc. (CBS), Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Incorporated appeal from a final judgment entered after trial in the Southern District. Appellants commenced this copyright infringement action[1] against defendants-appellees, Teleprompter Corporation (Teleprompter) and its subsidiary Conley Electronics Corporation, who own and operate numerous Community Antenna Television (CATV) systems throughout the country.

[1]The original action was commenced on December 11, 1964. Attempts to consolidate this action with United Artists Television v. Fortnightly, 255 F. Supp. 177, 149 USPQ 758 (S. D. N. Y. 1966), aff'd 377 F. 2d 872, 153 USPQ 696 (2d Cir. 1967), rev'd 392 U. S. 390, 158 USPQ 1 (1968), in the district court were unsuccessful. The parties voluntarily stayed proceedings in this case while Fortnightly was on appeal. After the Fortnightly decision, supplemental complaints were filed on December 15, 1969 and May 17, 1971.

Appellants are creators and producers of television programs that were protected by statutory copyrights and that were licensed to television stations affiliated with the CBS Television Network, a division of CBS, and to several independent television stations. The complaint alleged that the Teleprompter cable systems intercepted the signals of television stations broadcasting appellants' copyrighted works and then channeled these programs to their paying subscribers without authorization or license, thereby infringing appellants' copyrights.[2] After trial,[3] the district

[2]Appellants claim to have been injured because Teleprompter's CATV systems distributed signals of stations carrying the copyrighted programs to viewers who could not otherwise have received them. When a CATV system brings a program into its market from a more distant television market, appellants assert that this has a serious adverse impact on the copyright holder's ability to license that program for later presentation in the importing market.

We have been informed by one of the amici that a copyright holder usually licenses his programs first to a network and later to local stations for broadcast. The larger markets are ordinarily licensed first because of the greater demand caused by competition among the more numerous broadcast stations in those markets. We are told that if a CATV system brings into the smaller markets programs that are broadcast by network or independent stations in the larger markets, it reduces the potential audience for that program when it is later licensed for exhibition by a local station. As a result, the fee that the station in the smaller market is willing to pay for the right to broadcast the program will diminish, appellants assert, to the injury of the copyright holder.

Teleprompter has argued that the copyright holder can demand a greater fee from the broadcast station in the larger market in light of the greater audience that will now view the programs as a result of CATV. However, appellants have responded, and we must agree, that the amount that a broadcast station is willing to pay for the privilege of exhibiting a copyrighted program is economically tied more to the fees that advertisers are willing to pay to sponsor the program than to some projected audience size. No evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program. Indeed, economics and common sense would impel one to an opposite conclusion.

[3]By pre-trial order, the trial of this case divided into separate stages. The first stage, on appeal here, concerned the issue of whether or not Teleprompter had infringed appellants' copyrights.

court, holding that the reception of telecasts of appellants' copyrighted programs by Teleprompter's CATV systems and the distribution of these programs to CATV subscribers did not infringe appellants' copyrights, entered judgment dismissing the complaint. From that judgment, appellants have taken this appeal.

The pertinent facts were the subject of two lengthy stipulations and are basically undisputed. The legal issue concerns the proper interpretation to be given to § 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. § 1(c) and (d).[4] This provision gives the copyright holder the exclusive right, inter alia, to perform the copyrighted work. The issue here, therefore, is whether Teleprompter's CATV systems "performed" the copyrighted works within the meaning of this provision. In resolving this question, we are not writing on a clean slate, for the Supreme Court, on somewhat different facts, considered the meaning of "perform" in this provision in Fortnightly Corp. v. United Artists, Inc., 392 U. S. 390, 158 USPQ 1 (1968). Relying

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[4] "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever * * * and

(d) To perform or present the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce, or reproduce it, in any manner or by any method whatsoever * * *."

on Fortnightly, the district court held that the CATV systems here did not "perform" the copyrighted works.

The allegations of infringement were limited to an illustrative group of copyrighted programs. Similarly, the complaints charged five specific and illustrative CATV systems with having infringed appellants' copyrights, although presumably other CATV systems owned by Teleprompter conducted similar activities. As a result, the copyright claims at issue involve, and are limited to, the operations of Teleprompter's CATV systems in five cities at stated periods: Elmira, New York in November 1964; Farmington, New Mexico in November 1964, June 1969, and March 1971; Rawlins, Wyoming in June 1969; Great Falls, Montana in June 1969; and New York City in June 1969 and March 1971. A knowledge of the operations of each of these systems is essential to an understanding of our resolution of the issues.

Elmira: In November 1964, the date of the only infringement alleged with regard to the Elmira CATV system, the system had the capacity to carry twelve television channels. It received and provided its viewers with the programs of ten television broadcast stations located in Elmira and in communities varying from 46 to 173 miles away. Broadcasts from CBS affiliates, as well as from some stations with other network affiliations, in Buffalo (119 miles), Scranton (76 miles), Syracuse (64 miles), and Binghamton (46 miles) were received off-the-air[5] at the system's antenna site on a hill adjacent to Elmira and were made available to the system's subscribers. Because of dis-

[5]The term, "off-the-air," will be used throughout this opinion to indicate the reception of broadcast television signals by means of an antenna or similar receiving equipment. We use the term, "broadcast," in accordance with the definition given to "broadcasting" in 47 U. S. C. § 153(o). Thus, "off-the-air" reception does not include the reception of microwave transmission. See note 6, infra.

tance and topographical conditions, satisfactory reception of the stations in Buffalo and Scranton is not available by means of rooftop antennas in most locations in and around Elmira. Satisfactory reception of the Syracuse stations is available only in some locations in the northern portion of Elmira. One of the Binghamton stations can be satisfactorily received from rooftop antennas, but the other station cannot. In addition, the Elmira system had two channels that were provided by means of microwave links.[6] One of these was licensed to the school system, which originated educational programming that was transmitted by microwave from the schools to the CATV system for distribution. The second microwave link served to connect the system with an antenna nearer New York City, where a New York independent station was received off-the-air. None of the copyrighted programs was broadcast by this independent station.

Farmington: On two of the dates of alleged infringement, November 1964 and June 1969, Teleprompter operated a five-channel system in Farmington. The system received and distributed to its subscribers the signals of four broadcast stations, all of which were received off-the-air on antennas located on a mesa thirty miles from Farmington. Originally, all the stations were from Albuquerque, New Mexico (144 miles from Farmington); later, a station from

[6]A microwave link involves the transmission of signals through the air. However, microwave transmission in itself is not broadcasting. A broadcast signal, according to 47 U. S. C. § 153(o), is transmitted by a broadcaster for "[reception] by the public." In the case of microwave, the signal is focused and transmitted in a narrow beam aimed with precision at the receiving points. Thus, microwave transmission is point-to-point communication. The receiving antenna must be in the path of the signal beam. If the transmission must cover a considerable distance, the microwave signal is transmitted to the first receiving point from which it is re-transmitted to another receiving point, and this process is repeated until the signal reaches the point from which it is distributed by cable to subscribers.

Durango, Colorado (43 miles) was added during periods when one of the Albuquerque stations was not broadcasting. Because of distance and mountainous terrain, reception of the Albuquerque stations directly off-the-air by means of rooftop antennas was not feasible. However, the Albuquerque stations, including a CBS affiliate that broadcast several of the copyrighted programs, were received in Farmington on rooftop antennas because they were rebroadcast by "translators"[7] under a license issued by the Federal Communications Commission and pursuant to authorization given by CBS and the station. The mountainous terrain also made it impossible to receive by means of rooftop antennas the Durango station, which is also a CBS affiliate. This Durango station, however, entered into a letter agreement with the Farmington CATV system in which it authorized the latter to distribute the station's programming to its subscribers.[8]

By March 1971, the third date of alleged infringement, the system had been rebuilt with twelve-channel equipment. At this time, it received and distributed the broadcasts of nine stations: four from Albuquerque, one from Durango, and four independent stations from Los Angeles (600 miles from Farmington). Obviously, the Los Angeles stations were not receivable from rooftop antennas in Farmington. These stations were received on an antenna located approximately fifty miles from Los Angeles and linked with the Farmington system by a microwave system, 1300 miles in length.

On the one additional channel available to the system in 1964 and 1969, it originated some limited programming,

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[7] A "translator" is a television broadcast translator station that is authorized to rebroadcast a specific station's signals.

[8] Teleprompter has not attempted to show that this letter agreement amounts to an authorization or license for its carriage of the copyrighted programs. The parties stipulated that no such authorization or license was requested or received.

which consisted of general interest programs such as local news, sports, and movies, an automated time and weather scan,[9] and occasionally some educational programs. When the channel capacity had increased in 1971, the automatic time and weather scan was originated on a non-broadcast channel[10] on a full-time basis. On a second non-broadcast channel, educational programming was offered. And on the third available channel, the CATV system originated twenty hours per week of general interest programs.

Rawlins: At the time of the alleged infringement, in June 1969, the Rawlins CATV system had a twelve-channel capacity. The system received and made available to its subscribers programming from six broadcast stations, five from Denver, Colorado (184 miles from Rawlins), on which the copyrighted programming was carried, and one from Casper, Wyoming (87 miles from Rawlins). The system received the Denver stations, which could not be received in Rawlins from rooftop antennas, off-the-air on antennas located ninety miles from Denver, and transmitted them by microwave link to Rawlins. The Casper station was received off-the-air on an antenna located at the edge of town. Because of mountainous terrain, reception of the Casper station directly off-the-air by rooftop antennas was not generally possible; however, the Rawlins audience did receive its broadcasts as a result of rebroadcasts by a translator. At the time of the alleged infringement, the only program origination on non-broadcast channels that the CATV system produced was an automated time and weather scan.

Great Falls: The Great Falls CATV system was a twelve-channel system at the time appellants allege it to

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[9]This consisted of an automated camera that scanned clock and weather dials.

[10]A "non-broadcast channel," as used in this opinion, is a channel that offers a CATV system's own original programming but does not offer programs received from broadcast stations.

have infringed their copyrights. It received and distributed to its subscribers programming of nine broadcast stations. Three of the stations (including the one that broadcast the program whose copyright is alleged to have been infringed) were in Spokane, Washington (286 miles from Great Falls), one was in Lethbridge, Canada (163 miles away), two were in Salt Lake City (466 miles away), and one was in Helena (71 miles away). The system received the signal of each of these stations off-the-air by means of antennas located at varying distances from the originating stations (17 to 95 miles) and transmitted it by microwave to a point in Great Falls, from which it was distributed by cable to the system's subscribers. Because of distance, mountainous terrain, and the limitations of the individual stations, the Great Falls audience could receive none of these broadcast stations by means of rooftop antennas. In addition, the system received the signals of two Great Falls stations off-the-air by means of antennas located in the community, and distributed these signals to its subscribers. On a non-broadcast channel, the system offered an automated time and weather scan. On another non-broadcast channel, the system originated ten hours per week of movies and local interest programs.

New York: At the time of the first alleged infringement, in June 1969, Teleprompter's New York CATV system had a twelve-channel capacity. By March 1971, the time of the second alleged infringement, its capacity had increased to thirteen channels. Under the terms of the system's franchise, it must receive and distribute all eleven New York City stations and is barred from importing any stations from outside New York City. From time to time, microwave has been used to connect the system's main antenna with two subsidiary antennas. The signals of the New York stations were received off-the-air by these antennas and distributed by cable to the subscribers. The

New York system, on its non-broadcast channels, offered several forms of automated originations, in addition to originating from forty to seventy hours of local and general interest programming per week. In connection with one of the latter types of originations, a sports event, the Teleprompter system sold some commercial time and interconnected with other CATV systems in the New York area.

I. Fortnightly Corp. v. United Artists, Inc.

The starting point in our analysis of appellants' copyright-infringement claims must, of course, be the Supreme Court's decision in Fortnightly Corp. v. United Artists Television, Inc., supra. In deciding whether the Fortnightly CATV system "performed," within the meaning of the Copyright Act, the programming that it provided to subscribers, the Court applied a functional test and held that the CATV system there involved was functionally related more to the television viewer, who does not "perform," than to the television broadcaster, who does "perform." In this regard, Mr. Justice Stewart, speaking for the Court, said:

> The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform * * *.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. *Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals;* it provides a well-located antenna with an efficient connection to the viewer's television set. (Emphasis added.) pp. 398-99, 158 USPQ at 4-5.

The teaching of Fortnightly is that a CATV reception service that receives broadcast signals off-the-air from an antenna or other receiving equipment erected within or adjacent to the community it serves, and distributes the programming received to subscribers, does not "perform" the programs and, thus, is not subject to copyright liability, even though the subscribers could not otherwise receive the programs without the aid of CATV. Appellants correctly note that the operations of each of the CATV systems involved here were different and broader than those of the system before the Supreme Court in Fortnightly. Fortnightly's system provided a simple reception service and consisted of "antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers." Fortnightly, p. 392, 158 USPQ at 2. Although Fortnightly was decided in 1968, the litigation in that case had been instituted in 1960, and, as a result, the Court considered CATV in a state of technology that was then eight years out-of-date. Hence, the Court did not have before it a system that originated programming on non-broadcast channels, that sold commercials on its origination programming, that had the capacity to interconnect with other CATV systems, that utilized microwave links in bringing broadcast signals to its subscribers, and that imported signals from stations located hundreds of miles away from the community that the

system was intended to serve. Appellants' counsel inform us that the Supreme Court was made aware of the changing technology of CATV by counsel for amici and by counsel for Fortnightly (who represent Teleprompter here). Indeed, the Court's opinion in at least two places implied that it was aware of this fact and was not necessarily laying down a broad rule to apply to all CATV systems regardless of the nature of their operations.[11]

The question before us is whether the character of CATV is so changed by the additional services that the cable systems here have undertaken that their total operation, including the reception service, under the Fortnightly functional test, have become functionally equivalent to those of a broadcaster, and thus these systems should be deemed to "perform" the broadcast programming that they distribute. The additional operations undertaken by these CATV systems, which appellants contend distinguish this case from Fortnightly and bring about this asserted metamorphosis in the character of CATV, are the following: 1) origination of programming on non-broadcast channels, and the sale of commercial time on such non-broadcast programming; 2) interconnection with neighboring CATV systems; 3) use of microwave links in bringing broadcast programming to subscribers; and 4) the importation of distant broadcast signals from outside the area served by the CATV system. We shall consider in order the effect of each of these operations on the application of the Fortnightly doctrine to the CATV systems involved.

II. Non-broadcast Program Origination

At the outset, we reiterate that what is involved here is the origination of programming on channels not used for the distribution of broadcast signals and the sale of com-

[11]See Fortnightly Corp. v. United Artists, Inc., 392 U. S. 390; 392n. 6, and 399n. 25, 158 USPQ 1, 2.5 (1968).

mercials on such non-broadcast channels. We do not have before us, and thus do not consider, the question of what the effect would be on the Fortnightly doctrine if programs originated by the CATV system were used to replace selected broadcast programming received from network or independent stations that would otherwise have been distributed without alteration to subscribers on broadcast channels. Similarly, we do not have before us a CATV system that sold commercials on broadcast programming to replace the commercials sold and transmitted by the broadcast station.

Although the Supreme Court noted in Fortnightly that it was not dealing with a CATV system that originated non-broadcast programming,[12] we fail to see why a system's program origination on channels other than those on which it relays broadcast programming should alter the result in Fortnightly. Obviously, the system "performs" those programs that it originates for distribution to its subscribers. However, we do not see the logic in appellants' contention that this program origination serves to convert the CATV system into a "performer" of those programs that it distributes to its subscribers on broadcast channels. Even though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a "performer" of the broadcast programming when it offers both origination and reception services, but remains a non-performer when it offers only the latter.

In support of their contention, appellants point to Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F. 2d 852, 61 USPQ 161 (2d Cir.), cert. denied, 323 U. S. 766, 63 USPQ 358 (1944). In that case,

[12]Note 11, supra.

the defendants had argued that they should not be subject to copyright liability for programs that they broadcast without advertising support but merely as a service to their listeners. This court rejected that contention, noting that the programs, even without advertising, served to increase the total number of station listeners and thus helped to maintain the station as a successful financial entity. Appellants argue that Debs supports their position that the various functions of the CATV systems should be considered as a whole to determine whether the system is functionally equivalent to a broadcaster, in which event it should be deemed a "performer" with regard to all programming it relays to its subscribers. This argument is but a general statement of appellants' particular contention that non-broadcast program origination converts the system into a "performer" with regard to broadcast programming distributed to subscribers.

Debs, however, does not support either proposition. The issue there was not whether the programs had been "performed"—indeed, having broadcast the programs, the station could hardly contend it was not a "performer"—but whether the programs had been performed *"for profit"*; and one can readily see that indirect "profit" accrued to the station in Debs as a result of its unadvertised broadcast of these programs. That decision is not authority for appellants' broad proposition that the operations of a CATV system must be viewed and evaluated for copyright purposes as a whole; and, thus, neither can it support the contention that a system's non-broadcast program origination converts it into a "performer" of broadcast programs distributed to subscribers by its reception service.

Therefore, we hold that the fact that certain of the CATV systems involved here originated programming and non-broadcast channels did not make them "performers,"

for copyright purposes, of broadcast programming distributed to subscribers. A contrary approach would be unnecessarily wooden and mechanical in its application of copyright law to CATV.[13]

With regard to the sale of commercial time on non-broadcast programming, although this is another step bringing cable origination programming in competition to some extent with broadcast programming, again, we do not agree with appellants' position that there is some sort of "spill-over" effect by which the system becomes a "performer" with regard to its reception service.

III. Interconnection

As noted earlier, Teleprompter's New York CATV system has occasionally interconnected its facility with those of the two other CATV systems operating in the New York area. Appellants analogize this activity to the networking that is common among broadcast stations, and they point to this as another factor making the New York system functionally equivalent to a broadcaster. However, the only interconnection with which we are concerned occurred in two instances of sporting events that the system originated on non-broadcast channels. There was no interconnection here relating to the reception of any telecast of appellants' copyrighted programs, or indeed of any broadcast programming, received by the system and distributed to subscribers. Therefore, we are not presently in a position to evaluate what

[13]The Federal Communications Commission has adopted rules, which appear in 47 C. F. R. § 76.201, requiring CATV systems with more than 3,500 subscribers to commence program origination, which is known in industry parlance as "cablecasting." These rules were suspended pending judicial review of the FCC's CATV rules. Although FCC authority over CATV was sustained in United States v. Midwest Video, 405 U. S. 649 (1972), the FCC has not yet reinstated the rules.

effect interconnection may have on CATV copyright liability if and when it ever reaches the point at which it is equivalent to a network of CATV systems. In light of the minimal interconnection we have before us, we must agree with the district court that "[w]hatever this brief interconnection may portend for the future, it [did] not transform [Teleprompter's] present CATV system into a broadcasting network as [appellants] suggest."

IV. Microwave

A relatively recent development in CATV technology that was not before the Court in Fortnightly is the use of microwave to transmit a broadcast signal from the point of its reception off-the-air to the point from which it is distributed by cable to the homes of subscribers. Typically, microwave is used to import distant signals into the CATV community, an activity the effect of which on the issue before us we shall consider below.[14] However, the use of microwave is not necessarily limited to this activity.

Appellants contend that the use of microwave, in and of itself, is sufficient to make a CATV system functionally equivalent to a broadcaster and thus subject to copyright liability for all the programming it receives and distributes to its subscribers. We are unconvinced by this contention. Neither do we believe that the use of microwave makes the system a "performer" only of that programming with respect to which the microwave is used. Microwave utilizes

[14]Although we consider them separately, the use of microwave and the importation of distant signals are often very closely connected, in the sense that microwave links are the usual means by which a CATV system imports distant signals. As is evident from the experience of the New York system, however, it is possible for microwave to be used apart from distant signal importation, and it is in this sense that we consider in this section of the opinion the effect of microwave on the application of Fortnightly to CATV systems.

point-to-point communication and is merely an alternative, more economical in some circumstances, to cable in transmitting a broadcast signal from one point in a CATV system to another. Hence, we see no reason to attach legal significance, in terms of copyright liability, to the decision to utilize microwave links.

V. Importation of Distant Signals

Appellants' final, and in the end, most persuasive, contention relates to the fact that certain of the CATV systems involved here distributed to their subscribers signals from broadcast stations located many miles from the communities served by the systems. In CATV parlance, this is known as the importation of distant signals. This activity was not before the Supreme Court in Fortnightly, and appellants contend that that decision did not signify that a CATV system does not "perform" a copyrighted television program when it brings the signal in from another community, often from another television market, and distributes that signal to subscribers.

The CATV system in Fortnightly brought television signals to viewers who could not otherwise have received them. However, these signals were already in the community and were not imported by the CATV system from another community, as is evidenced by the fact that the system received them from an antenna located in or directly adjacent to the CATV community. It was only because of topographical conditions in and around the community that residents could not receive the signals on their receivers. Thus, it was the office of the CATV system in Fortnightly to use its advanced antenna technology and equipment to overcome these adverse conditions and thereby to bring the signals to members of the community. The Supreme Court held that, in performing this function, the

CATV system did not "perform," within the meaning of the Copyright Act, the programming carried on those signals. However, in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), decided just one week before Fortnightly, the Court explicitly recognized that this was only one of two major services that CATV systems render to the communities they serve. In this regard, Mr. Justice Harlan, speaking for the Court, stated at p. 163:

> CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to "perform" the programming distributed to subscribers on these imported signals. See Select Theatres Corp. v. Ronzoni Macaroni Co., 59 USPQ 288 (S. D. N. Y., 1943), cited in Fortnightly, 392 U. S. at 398, n. 23, 158 USPQ at 5, for the proposition that "broadcasters perform." The system's function in this regard is no longer merely to enhance the subscriber's ability to receive signals that are in the area; it is now acting to bring signals into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area.

In Fortnightly, the CATV system distributed the programs to an audience to which they would not otherwise have been presented. But the Court did not find this fact significant for copyright purposes. The Court found that

the CATV system made these programs available to this new audience by providing it with the services of an advanced antenna. It then reasoned that, since a television viewer was privileged to view whatever programs he could receive using any available antenna, a CATV system should not be deemed a "performer" for copyright purposes when it provided this antenna service as a commercial venture. When a distant signal is involved, CATV is again distributing television programming to a new audience that could not otherwise have viewed it. However, in this case, the new audience is one that would not have been able to view the programs even if there had been available in its community an advanced antenna such as that used by the CATV system. The added factor in such a case is the signal transmitting equipment, such as microwave links, that is used to bring the programs from the community where the system receives them into the community in which the new audience views them. The viewer's ability to receive the signal is no longer a product solely of improved antenna technology; rather it results from the system's importation of the signal into the CATV community from a separate, distant community.

As a result, we no longer have a system that "no more than enhances the viewer's capacity to receive the broadcaster's signals." Fortnightly, p. 399, 158 USPQ at 5. We hold that when a CATV system imports distant signals, it is no longer within the ambit of the Fortnightly doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant signals that it distributes to its subscribers.

There remains, however, the difficult problem of defining what is a distant signal. The range of a television

signal is a function of many factors, including the current state of broadcast and reception technology. Some of these factors, such as topography, are unchanging in a particular area. But broadcast and reception technology are in a constant state of flux. Moreover, in determining the range of a broadcast signal, it may not be enough to say that the signal is or is not receivable in the community served by the CATV system. The fact that the signal can be received may not be meaningful unless it can project an image that is acceptable acording to industry norms.

Thus, it seems clear that a precise judicial definition of a distant signal is not possible. The FCC for purposes of the CATV signal-carriage requirements, at one time categorized signals as "distant" and "local" in terms of their ability to be received a substantial portion of the time by a substantial portion of the homes in the area by means of home antennas.[15] However, we find this definition unsuitable for copyright purposes because we believe that any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of Fortnightly. Thus, in the absence of legislation on this matter, we must undertake to establish some standard for determining what is a distant signal for copyright purposes.

Any determination that a particular television signal is "distant" must, of course, be made with respect to its proximity to a specific local area, which we have termed the

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[15]This was phrased in terms of the Grade B contour, which marks the boundary along which acceptable reception of the signal is expected to be available 90 percent of the time at the best 50 percent of the locations. See 47 C.F.R. §§ 73.683 and 73.684. With respect to locations outside its Grade B contour, a signal was considered a "distant signal" by the FCC. Recently the FCC has promulgated regulations that give a broader definition of distant and local signals for purposes of the signal-carriage requirements of CATV systems. 47 C.F.R. §§ 76.59, 76.61, and 76.63. See 37 Fed. Reg. 3263 (Feb. 12, 1972).

CATV community, served by the CATV system and designated in a franchise issued to it by a state or local government body or regulatory authority.[18] To say that a particular signal is already in the community, which is to say there is no need to import it through a relay or retransmittal device (such as microwave, cable, satellite, or the like), is to indicate that it can be received in the community during a substantial portion of the time by means of an antenna, such as a large community antenna or other receiving device, that is available under current technology. Thus, the meaning of "distant signal" must be determined in light of the current broadcasting and receiving technology. In this regard, we find that it is easier to state what is not a distant

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[18]The franchise represents a grant to the CATV system of authority to run its cables through the public streets and facilities of a city, town, or county to the homes of its subscribers.

Almost 5,000 such franchises have already been granted, with the number continuing to increase. See Barnett, State, Federal and Local Regulation of Cable Television, 47 Notre Dame Lawyer 681, 702 (1972). Although the franchises have for the most part been issued by local authorities such as cities and towns, at least five states (Connecticut, Nevada, Rhode Island, Vermont, and Hawaii) have in effect laws subjecting CATV to state regulation, and more appear to be in the process of enacting such state regulatory schemes (e.g., Massachusetts, Illinois, New York and New Jersey), probably because of the disadvantages associated with local as compared with state-regulation, id. at 698-708. Hence it may be anticipated that some state agencies may, as part of their new regulatory schemes, create local franchise areas or regions within the state based upon community of interest and population concentrations, as has been done by Connecticut. Id. 701-02.

As used by us, the term "CATV community" is limited strictly to the specifically designated local area for which the franchise is granted by the state or local authority, which may not be expanded or enlarged by interconnection, merger of two or more franchised areas, or other means. We do not have before us, and thus do not consider, the hypothetical case in which the area for which the franchise is granted is not local, but state-wide or comprising a broad region. We are aware of no such franchise presently granted or under consideration. For the moment, we can say that the "CATV community" we envision is essentially a local entity, the parts of which share substantial common interests.

signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or retransmittal,[17] an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal. This seems to us to be required by Fortnightly.

When the community from which the signal originates, which we term the originating community, and the CATV community are different, and when the signal is initially received by the system at a location in or near the originating community and then transmitted to the CATV community by microwave or cable, a strong presumption arises that it is a distant signal. The alleged infringer is then under a heavy burden to show that the signal is not a distant signal —that is, that it would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community. Unless this burden is met, the signal should be deemed a distant signal, and the CATV system would not be within the ambit of Fortnightly with respect to that signal.

Similarly, when the signal is initially received by the CATV system on an antenna or other receiving device located between the originating community and the CATV community, the signal should be deemed a distant signal in the absence of a contrary showing by the CATV system. We do not necessarily mean that the antenna or receiving

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[17]By "relay or retransmittal," we do not mean the authorized rebroadcast of the signal by a translator station, or the like. See note 19, infra, and accompanying text, where we indicate that the mere use of a translator does not, without more, make the signal a "distant signal," as that term is used in this opinion. It should be noted that microwave transmission, in the context of CATV distant-signal importation, does not constitute a broadcast or a rebroadcast. "Broadcasting" is defined at 47 U.S.C. § 153(o) as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

device on which the signal is initially received cannot in any case be located outside the city limits of the community that has franchised the CATV system. We can envision various legitimate circumstances, such as the desire to take advantage of a tall building, hill, or other topographical feature, that might cause the system to desire to locate its antenna or receiving device in an area closely neighboring the community that it serves. Such an antenna placement is not motivated by the desire to be closer to the signal's point of origin in order to receive it before its strength is dissipated and then to transmit to another location—presumably the motive that ordinarily underlies a system's decision to locate its antenna outside the community that it serves. Therefore, we would treat such a case in the same manner as those in which the antenna is located within the CATV community. However, we wish to make clear that the distances we envision here are small, and that any system that locates its antenna more than a few miles from the CATV community should bear the burden of showing that the signals it receives and distributes are not in fact distant signals.[18]

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[18]Teleprompter has argued that it is insulated from copyright liability by a license implied in law. This court explicitly rejected this argument in our Fortnightly decision. United Artists, Inc. v. Fortnightly Corp., 377 F. 2d 872, 880-884, 153 USPQ 696, 703-706 (2d Cir. 1967), rev'd. 392 U. S. 390, 158 USPQ 1 (1968). The Supreme Court in Fortnightly refused to embrace this argument when it rejected the Solicitor General's proposed compromise resolution of that case, although it did not necessarily reject this line or reasoning. See 392 U. S. 401-02, 158 USPQ at 6. Teleprompter argues that the terms of our decision on this issue in Fortnightly would not necessarily apply to the facts presented by three of the five CATV systems involved here—Elmira, New York City, and Farmington. In light of our resolution of this case, we need not deal with this contention with regard to the Elmira and New York City systems. As to the Farmington system, our decision with regard to the Albuquerque stations obviates the necessity to consider the license-implied-in-law issue. See Part IV, infra. On the matter of the Durango station, see note 20, infra. In other respects, we decline to re-examine our prior decision on this issue in Fortnightly.

VI. Conclusion

In light of what we have said, we conclude that the CATV systems in New York City and Elmira were properly held not subject to copyright liability. In the case of New York City, it was stipulated that the Teleprompter system did not at any time import distant signals. As to Elmira, although it appears that the system did import and distribute one distant signal from New York City, it is stipulated that none of the programs at issue involving alleged copyright infringement were carried by that station. The remaining stations distributed by the Elmira system were stipulated to have been received by an antenna located on a hill directly neighboring the city, and were thus not distant signals. Therefore, the Elmira system was properly held not subject to copyright liability with respect to programming carried on these signals.

On the other hand, the Rawlins CATV system imported five Denver stations from a distane of 184 miles. It was on these Denver stations that the programs at issue were carried. The system received these stations on an antenna located 90 miles from Denver. Therefore, we conclude that these Denver signals were presumptively distant signals and that, in distributing the programs carried on these stations, the Rawlins system "performed" the copyrighted programs and thereby infringed appellants' copyrights. For the same reason, we hold that the Great Falls system "performed" the copyrighted programs, which were distributed to subscribers through the importation of a signal originating in Spokane, Washington (284 miles from Great Falls) and received by antennas located 55 and 67 miles from Spokane.

The Farmington system provides potentially the clearest example of distant signal importation, in that signals originating in Los Angeles, California, 600 miles away, were distributed to subscribers. Only one of the Los An-

geles stations broadcast any of the copyrighted programs at issue. Inasmuch as this station was received off-the-air by an antenna located a substantial distance from Farmington and then transmitted to the Farmington CATV system for distribution, it is presumptively a distant signal under our holding, and Teleprompter must be held to have "performed" the copyrighted program. The other alleged infringements relate to programs that were carried by stations located in Albuquerque (144 miles) and Durango, Colorado (43 miles). These signals were received by the CATV system on an antenna located on a mesa 30 miles outside of Farmington. We believe that a distance of 30 miles is too great to sustain an assertion that the antenna is adjacent to the CATV community. Instead, on these facts, we must treat the system as one that has located its antenna outside the CATV community. Thus, in the absence of a contrary showing by Teleprompter, these signals should also be deemed distant signals and the system should be held to have "performed" the copyrighted programs and thereby infringed the copyrights.

Of course, each system deemed to have imported distant signals must be afforded an opportunity to show that, although the receiving antenna was located outside the CATV community, the particular signal could have been received in a similar fashion by an equivalent antenna located in or adjacent to the CATV community. We seriously doubt that the Rawlins and Great Falls systems could sustain this heavy burden because of the great distances involved. Similarly, it is doubtful that the Farmington system will be able to make such a demonstration with regard to the Los Angeles station. However, the Farmington system may be in a somewhat better position with regard to its carriage of the Albuquerque and Durango stations. The alleged infringement resulting from this activity concerned programming broadcast by two CBS affiliates—one from Al-

buquerque and one from Durango. The parties have stipulated that

> "[p]ursuant to permission granted by CBS and by [the Albuquerque affiliate], the signals [of the affiliate] * * * were rebroadcast [by a translator system] located near Farmington * * *. All of the signals embodying the programs as to which infringement by the Farmington CATV is alleged * * * were rebroadcast by these translators."

It was further stipulated that, as a result of these translators, "[t]hese signals * * * could be received by residents of Farmington on rooftop antennas."

From these facts, we conclude, without the need for further showing by Teleprompter, that these Albuquerque stations could have been received by a CATV antenna located within Farmington of substantially similar sophistication to that erected on the mesa. Thus, it is clear that the Albuquerque stations were not distant signals, and there is no need to remand to the district court for findings on this point.[19] On the other hand, the stipulation indicated that the signals of the Durango affiliate were not rebroadcast and could not be received by means of rooftop antennas. Thus, if the system is unable to demonstrate that the Durango station is not a distant signal, it must then be regarded as a "performer" of the programming distributed to subscribers on that station. Since the copyrighted programs were distributed to subscribers on both the Albu-

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[19]Although these signals were receivable because they were rebroadcast by translators, our earlier statement of the governing standard, "that any signal capable of projecting, without relay or transmittal, an acceptable image that can be reached off-the-air * * * by means of an antenna * * * erected in or adjacent to the CATV community is not a distant signal," does not make the Albuquerque stations distant signals. We were not referring to an authorized rebroadcast of the signal.

querque and the Durango stations, this leads to the conclusion that the Farmington system was a "performer," and thereby infringed the copyright, when it distributed the programs on the Durango station, but was not a "performer," and did not infringe, when it distributed the same programs on the Albuquerque station.[20] Although this result is somewhat lacking in symetnry, in the final analysis it will probably result in minimal damages, if any, being imposed on the Farmington CATV system; for we find it hard to see what damages appellants can have sustained, or what profits Teleprompter earned, from the carriage of the Durango broadcasts in light of the system's simultaneous non-infringing distribution of the programs on the Albuquerque CBS affiliate. By the simple turn of a knob, the viewers who saw the programs on the Durango station could have viewed them, as a result of the efforts of the same CATV system on the Albuquerque station. However, we think that, unless the Durango station is shown not to have been a distant signal, there was at least a technical infringement of the copyright with regard to that station.

Accordingly, in light of our disposition of the issues on this appeal, we affirm the district court's holding that Teleprompter's Elmira and New York City CATV system did not infringe appellants' copyrights; we reserve the district court's decision with regard to Teleprompter's Rawlins, Great Falls, and Farmington CATV systems, without prejudice, however, to Teleprompter to proceed in the district court within a reasonable time to show that any of these systems did not in fact import distant signals; and we remand to the district court for further proceedings, includ-

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[20]We do not believe that the carriage of the Durango stations falls within our reservation of decision in Fortnightly on the issue of license implied in law, since the Durango station's broadcasts were not receivable off-the-air by means of rooftop antennas in Farmington. See 377 F. 2d at 884, 153 USPQ at 705-706.

ing the determination of damages, as are not inconsistent with this opinion.

The complex problems presented by the issues in this case are not readily amenable to judicial resolution. As the Supreme Court said in Fortnightly, "[w]e [must] take the Copyright Act of 1909 as we find it," and do the best we can. We hope that the Congress will in due course legislate a fuller and more flexible accommodation of competing copyright, anti-trust, and communications policy considerations, consistent with the challenges of modern CATV technology.

Affirmed in part and reversed and remanded in part.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March, one thousand nine hundred and seventy-three.

Present: HON. J. EDWARD LUMBARD
HON. IRVING R. KAUFMAN
HON. WALTER R. MANSFIELD
Circuit Judges,

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC. and DENA PICTURES, INCORPORATED, *Plaintiffs-Appellants,* v. TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION, *Defendants-Appellees.*	72-1800

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings, including the determination of damages, as are not inconsistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX B

District Court, S. D. New York

COLUMBIA BROADCASTING SYSTEM, INC., et al.
v.
TELEPROMPTER CORPORATION et al.

64 Civ. 3814 Decided May 2, 1972

Action by Columbia Broadcasting System, Inc., Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Inc., against Teleprompter Corporation and Conley Electronics Corporation for copyright infringement. Complaint dismissed.

See also 148 USPQ 417.

ROSENMAN, COLIN, KAYE, PETSCHEK, FREUND & EMIL, ASA D. SOKOLOW, RENEE J. ROBERTS, JAMES K. NEVLING, JR., and HARRY OLSSON, all of New York, N. Y., for Columbia Broadcasting System, Inc.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, ROYAL E. BLAKEMAN, and BERTRAM WEIDBERG, all of New York, N. Y., for Calvada Productions.

ALEXANDER & GREEN and ALFRED C. MORAN, both of New York, N. Y., for Jack Chertok Television, Inc.

GRAUBARD, MOSKOVITZ, MCGOLDRICK, DANNETT & HOROWITZ and BERNARD BUCHHOLZ, both of New York, N. Y., for Dena Pictures, Inc.

CLEARY, GOTTLIEB, STEEN & HAMILTON, ROBERT C. BARNARD, R. MICHAEL DUNCAN, KATZ, SCHIER, ROSENSWEIG & SINDLE, WALTER C. SCHIER, and DAVID R. ROSENSWEIG, all of New York, N. Y., for defendants.

MOTLEY, District Judge.

I. Introduction

Four years ago, in Fortnightly Corp. v. United Artists Television, Inc., 392 U. S. 390, 158 USPQ 1 (1968) (Fortnightly), the Supreme Court developed the test by which the copyright liability of community antenna television (CATV) systems was to be measured.[1] Progress in the CATV industry has brought us the inevitable sequel to that case. We are asked here to decide whether specific differences between defendants CATV's and those in Fortnightly—most importantly, transmittal of broadcast signals from stations hundreds of miles away and program origination—make defendants liable for infringement of plaintiffs' copyrights.

Defendants Teleprompter Corp. (Teleprompter) and Conley Electronics Corp. (a wholly-owned subsidiary of Teleprompter) own a large number of CATV stations throughout the United States. Plaintiff Columbia Broadcasting System (CBS) operates a television broadcasting network, furnishing programs to approximately 200 affiliated television stations CBS owns copyrights on certain programs, and, in addition, licenses programs from the other plaintiffs who likewise produce television programs. De-

[1] "CATV" is the term generally applied by the Federal Communications Commission to facilities which receive signals over the air from television stations, modify them and distribute them by wire or cable to subscribing members of the public who pay for such service. 47 C. F. R. § 74.1101(a). The Supreme Court has also defined and applied this term. See United States v. Southwestern Cable Co., 392 U. S. 157, 161-163 (1968); Fortnightly Corp. v. United Artists, 392 U. S. 390, 158 USPQ 1 (1968). The CATV industry is also popularly known as "cable TV", "cablecasting", or even "broadband communications". By its tone, the designation "community antenna television" suggests a prejudgment of the issues in this case, implying as it does that CATV is no more than an antenna owned by the community. Nevertheless, because of its widespread use in at least the authoritative legal literature, we shall use "CATV" when referring to defendants' operations here.

fendants' CATV systems receive broadcast television signals embodying plaintiffs' copyrighted material and transmit those signals to the homes of their subscribers.

The parties agreed that the activities of five of defendants' facilities located in different parts of the country would best illustrate the nature and extent of defendants' activities for purposes of decision here. These five facilities are located as follows: Elmira, New York; Farmington, New Mexico; Great Falls, Montana; New York, New York; and Rawlings, Wyoming. The activities of these five stations, including how and from where they received plaintiffs' copyrighted materials, form the basis of a lengthy stipulation of facts. It is only the legal significance of those facts which forms the core of this dispute.

It is also stipulated that none of defendants' stations had licenses under the copyrights from plaintiffs or from the television broadcast stations around the country which broadcast the plaintiffs' programs over-the-air, and the licenses granted by plaintiffs to stations which broadcast their programs did not authorize carriage of the programs by CATV systems.

The ultimate question before us is whether defendants "performed" plaintiffs' works within the meaning of § 1 of Copyright Act. 17 U. S. C. § 1. In Fortnightly, the facts of which will be stated below, the Court addressed the issue of whether CATV's perform. Recognizing that "[t]elevision viewing results from combined activity by broadcasters and viewers," it held that broadcasters perform while viewers do not. The CATV system in Fortnightly, the Court concluded, fell on the viewer's side of the line and hence did not perform. This conclusion was reached by analyzing the "* * * function that CATV plays in the total process of television broadcasting and reception"; that is, whether the CATV system functioned more like a viewer or more like a

broadcaster. Comparing the function of the CATV system before it to that of both the viewer and his equipment and the broadcaster, the Court found the function of CATV more similar to the former.

It is plaintiffs' contention that defendants' five CATV systems engage in activities different from those of the CATV systems in Fortnightly, placing defendants' systems on the broadcaster's side of the line. Specifically, the following activities are said to have given defendants' CATV systems the function of broadcasters: 1) program origination, 2) the importation of distant signals, 3) selection of programs, 4) microwave transmission, 5) interconnection with other CATV stations, 6) advertising, and 7) sale of commercials. These activities, plaintiffs charge, were either not performed by the Fortnightly systems or were performed to a significantly lesser degree. Singly or together, plaintiffs suggest, these differences amount to a difference of function between defendants' systems and those in Fortnightly.

Not surprisingly, defendants stress the similarities between their operations and those of the Fortnightly systems. They further contend that, regardless of whatever else their stations do, with respect to plaintiffs' programs Teleprompter is conducting a reception service identical to the one in Fortnightly.[2]

We are thus faced with the question of the extent to which defendants' operations differ from those of the CATV systems in Fortnightly, and whether these differences cause defendants to function as broadcasters, therefore "performing" plaintiffs' works within the meaning of the Copyright Act. For the reasons set forth below we find that defendants have not performed plaintiffs' works in violation of the Copyright Act. Defendants are therefore not liable for infringement of copyright.

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[2]Defendants raise several other defenses we need not discuss at this point.

II. Findings of Fact

Since many of the facts in this case were stipulated by the parties, these findings will treat only the ultimate facts relevant to the decision.

A. Prior Proceedings

This action was commenced on December 11, 1964. At that time Fortnightly was pending before Judge Herlands in this District. Efforts to consolidate this case with Fortnightly for purposes of trial or appeal were unsuccessful, and by agreement of the parties proceedings in the instant case were stayed pending the ultimate decision in Fortnightly. Plaintiffs were granted permission to file supplemental complaints on December 15, 1969 and May 17, 1971 to include allegations concerning events up to March 31, 1971. By the pretrial order of October 23, 1970, trial of the case was divided into stages. The first stage, which this opinion addresses, is the trial of the issue of whether there was an infringement of copyright. A trial to the court was held from September 21 through 30, 1971.

B. Plaintiffs

CBS as a regular part of its business creates programs for television and acquires other programs. These programs are broadcast by television stations which are affiliates of the CBS Television Network (an unincorporated division of CBS); many of them are later placed in syndication—licensed to individual television stations for broadcast.

Jack Chertok Television, Inc., Calvada Productions and Dena Pictures, Inc. are independent program packagers which create television programs that are furnished to networks and independent television stations.

C. Defendants

Teleprompter Corp. is a New York corporation widely engaged in CATV activities. Conley Electronics Corp., an Illinois corporation, is a wholly-owned subsidiary of defendant Teleprompter.

Defendants' CATV systems, five of which were the subject of the evidence at trial, operate generally as follows. Homeowners who subscribe to CATV pay an installation fee and a monthly charge. The monthly charge does not vary with the amount of time CATV is used or with any particular programs watched. A coaxial cable links the homeowner's television set to the CATV facility. By means of this connection, homeowners receive two general types of programming on their sets. One is programming originated by the CATV systems themselves and carried by the cable. The other type is programming received off-the-air by CATV receivers which has been broadcast by "regular" TV broadcast stations. Frequently, the homeowner could not receive these signals via his rooftop antenna.

All of the five CATV's have the capacity to carry twelve channels to subscribers, except New York, which has a 25-channel cable link to some subscribers. None of the CATV's uses its full complement of available channels.

D. Origination

As mentioned above, Teleprompter's systems receive signals from television broadcast stations, modify the signals, and then carry them to subscribers' homes by coaxial cable. In addition, defendants' systems originate their own programs. This is done by transmitting programs live, on videotape or on film from the CATV station on channels not then being used for the received programs.

Some of the origination consists of a camera scan of time and weather information, printed messages, stock and

news tickers, and program listings—what may be called "automatic origination."

By 1969, all five of the stations were transmitting "automatic" origination, often consisting of time and weather information, virtually 24 hours a day.

In addition to this automatic origination, the stations carry varying amounts of other program origination. At the low end of the scale, the Elmira system occasionally originates educational programming from a studio located in a city school. This material appears on the same channel as the automatically originated programs, replacing the time, message and weather scan during that period. Aside from these educational shows, the only origination by the Elmira station is "automatic."

The Great Falls, Rawlins and Farmington stations originate more non-automatic programming than Elmira but less than New York. Though neither Great Falls nor Rawlins apparently originated any programming of this nature in 1964, by 1969 both were transmitting an average of ten hours a week besides time, weather and message scans. Farmington originated an average of four and a half hours a day, seven days a week in 1964, three hours a day, five days a week in 1969; and four hours a day, seven days a week in 1971.

New York City originated approximately forty hours a week of "non-automatic" programming during June 1969. By March 1971 this figure had grown to seventy hours a week.

Programs originated by the Great Falls, Farmington, New York and Rawlins systems have a wide range of content. Though the emphasis varies in different cities, with a large amount of local coverage by all systems, the kinds of programs originated by these four CATV systems are generally similar to those normally broadcast by television stations. Thus, Teleprompter originates news, sports and

weather reports, documentaries, educational and religious shows, discussions, interviews, bingo, sports events, children's shows, movies and entertainment films.

The number of hours of program origination is in all cases substantially less than the number of hours of broadcast programming transmitted by the CATV systems.

In originating programming some Teleprompter personnel perform tasks similar to those performed by people involved in broadcasting television programs. Some of the equipment used by the Teleprompter stations to originate programs is also used by broadcast stations.

E. Distant Signals

Since "[t]he effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer," (Fortnightly, 392 U. S. at 398, 158 USPQ at 4), it is impossible to define a precise line between a "distant" and a "local" signal. The term is applied here only to connote a distinction between signals ordinarily receivable by rooftop or tower-mounted antennas and those that are not. The plaintiffs, at least, place a great deal of importance on this difference.

All of Teleprompter's CATV systems except New York receive and carry to subscribers signals not ordinarily receivable either by house-top antennas or both house-top and tower-mounted antennas. These systems are outside the "Grade B" contour of the stations whose signals they receive and carry.

> "The Grade B contour of a television station is the boundary of a hypothetical area at whose outer limits television reception of 'a quality acceptable to the median observer' is expected to be available at least 90 percent of the time at the best 50 percent of

the receiver locations, based on expected field intensities and certain assumptions as to the nature and height of the receiving antenna, and the capabilies of the television set. For the Grade A contour the pertinent figures are 90 percent of the time and the best 70 percent of the locations. These predicted contours are plotted on the basis of propagation charts and rules set forth in 47 CFR 73.684." (Stipulation No. 1, ¶ 60.)

In most instances the signals are received in the locale where they were broadcast by a receiving antenna. The signals are then carried by microwave transmission, sometimes hundreds of miles, to a microwave receiving station. From there the signals would be carried by cable, eventually to subscribers' homes.

Teleprompter's Farmington, New Mexico and Great Falls, Montana systems best illustrate this importation of distant signals. Farmington lies 144 miles from Albuquerque, New Mexico. Due to the distance and rough topography between the two cities, television reception in Farmington of Albuquerque stations directly off-the-air by housetop or tower-mounted antennas is not feasible. Farmington CATV erected off-the-air receiving antennas on Huerfano Mesa, an elevated point about thirty miles from Farmington. Signals from the Albuquerque stations were received there, carried by microwave to the Farmington system's building in Farmington, and then to subscribers by cable.[3] Signals from a station in Durango, Colorado were also received at Huerfano Mesa and carried by Farmington CATV.[4] Though Durango is only 43 miles from Farmington, mountains between the two cities prevent reception in

[3]The stations are KGGM-TV (a CBS affiliate), KOB-TV, KNME-TV, and KOAT-TV.

[4]KREZ-TV (a CBS affiliate).

Farmington by house-top antennas. Farmington is within the "Grade B" contour of the Durango station.

Beginning in November 1970 the Farmington CATV received and distributed signals of four television stations on Los Angeles, California, in addition to those stations mentioned above.[5] Farmington is over 600 miles from Los Angeles, so off-the-air reception of the Los Angeles stations by either house-top or tower-mounted antennas is impossible. Signals of the Los Angeles stations were received off-the-air by antennas forty-seven miles from Los Angeles. They were then carried by microwave via twenty-three steps over a round-about, 1300-mile route to Farmington.

It should also be noted that translators owned by the San Juan Non-Profit TV Association serve the Farmington area. The Association's operations are supported by voluntary contributions from Farmington residents. A translator receives signals from a television broadcasting station, converts the carrier waves of the television signals to a new carrier frequency, amplifies them, and broadcasts them into the air. The translators in Farmington received three VHF stations located in Albuquerque and rebroadcast them on UHF frequencies.[6] Farmington residents could then receive the signals on housetop antennas. CBS and its Albuquerque affiliate, KGGM-TV, gave written permission for rebroadcast by the Association's translators.

The Great Falls CATV imports distant signals by a similar method of receiving the television broadcasts off-the-air near their source and carrying them by microwave to Great Falls. Signals are received in Great Falls from Spokane, Washington (226 miles); Lethbridge, Canada (163 miles); Salt Lake City, Utah (466 miles); and Helena, Montana (71 miles).

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[5]The stations are KTLA-TV, KTTV-TV, KHJ-TV, and KCOP-TV.

[6]The stations are KGGM-TV, KOB-TV, and KOAT-TV.

F. Program Selection

It appears that all five CATV systems carry every television broadcast station operating within their own areas. That is, any station a resident can receive by house-top antenna will also be brought to him over cable by his local CATV system. In addition, as we have seen, in all cities but New York a subscriber receives other, more distant, stations.[7]

Whereas they import distant signals, as described above, Teleprompter's systems make a decision about which stations should be received. Teleprompter has freedom to choose which signals from other cities to receive and transmit to each locale.

With possibly one exception, the Teleprompter CATV systems receive the signals of the television stations they carry continuously, and distribute them without editing or deletion, except for deletion of the signals of distant stations as required by the FCC's non-duplication rules. The one possible exception is the Farmington CATV, which for a period carried the signals of KREZ-TV in Durango, Colorado only in the evening hours.

Teleprompter's systems do not otherwise choose the sequence or content of programs they receive and carry to subscribers. Boardcasters determine the nature of programs to be viewed and the times they will be shown.

A viewer with an ordinary television set, of course, directly chooses the programs to be seen from those available to him by broadcast and CATV.

G. Microwave

As mentioned above, Teleprompter uses microwave transmission to carry signals from its receiving antennas

[7]The New York CATV's franchise from the City of New York specifies the television broadcasting stations to be carried by the CATV system.

to its various local systems. Microwave systems beam signals from a microwave transmitting antenna to specific microwave receiving antennas; these signals cannot be received with a television antenna. With one exception these transmitters send signals from one discreet point to another single specific location. That exception is a device called an Amplitude Modulated Link used by Teleprompter's New York facility which sends signals from one transmitter to two receiving points simultaneously.

In some cases Teleprompter owns the microwave equipment it uses (New York, some in Farmington); in others the microwave equipment is owned by an independent corporation (Elmira, some in Farmington and Great Falls). In all cases microwave serves the same function as cable in carrying signals from one point to another within the CATV system.

H. Interconnection

Teleprompter purchased the rights to carry to its subscribers the February 25, 1964 and May 25, 1965 heavyweight championship fights between Sonny Liston and Muhammed Ali. The fights were carried live to closed circuit theatres by an independent company and to Teleprompter's CATV systems in Farmington, Elmira and Great Falls by AT&T facilities. Defendants' CATV's were linked to the nationwide AT&T circuits carrying the signals. No additional or separate charge was made to subscribers for viewing the fights.

Teleprompter's New York CATV is connected by a microwave link to the two other CATV systems in New York City, as required by its franchise agreement with the City of New York.

I. Advertising

Teleprompter specifically advertises its originated programs in an effort to attract subscribers. It also advertises

the fact that subscribers can receive distant signals that are otherwise unavailable. It cannot be said either that the originated programs are publicized only to attract subscribers to a "basic" reception service, or, on the other hand, that the received programming is advertised in order to promote the "basic" sale of originated programs. Teleprompter's systems sell one basic service which includes both original programming and programming received off-the-air from broadcast stations. Teleprompter would be most likely to emphasize in its advertising whatever it thought would convince consumers to purchase this one service.

J. Sale of Commercials

Teleprompter's New York CATV system sold commercials for its original coverage of sporting events from Madison Square Garden, commencing on January 1, 1970. These commercial messages consisted of two ten-second "billboards" before and after the event (identifying the sponsor) and two 60-second commercial announcements during the program. The sponsor paid a total of $300 for each sporting event. Plaintiff introduced evidence that Teleprompter intends to increase its sales of commercials in the future, but during the period covered by the pleadings in this case, no other commercials than these were sold.

III. Conclusions of Law

Our point of departure in determining Teleprompter's liability under the Copyright Act is the Supreme Court's decision in Fortnightly. As mentioned above, Fortnightly held that the copyright liability of CATV "depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception."

(at 397, 158 USPQ at 4). Finding that television viewing results from the combined activity of broadcasters and viewers, the Court concluded that broadcasters perform while viewers do not. Our task, as the parties recognize, is to decide whether Teleprompter's systems "function" as broadcasters or as viewers.

Though it found the CATV systems before it to be on the "viewer's side of the line" (at 399, 158 USPQ at 5), the Fortnightly Court did not delineate the "functions" of a viewer and his receiving equipment. Rather, it analogized the function performed by CATV to that of "a well-located antenna with an efficient connection to the viewer's television set." Id. Both "received and delivered" electronic information (at 399 n. 27, 158 USPQ at 5). Whether this well-located antenna was owned by one homeowner, several homeowners or an entrepreneur did not affect its function in the Court's view.

The Court did set forth the important functions of broadcasters and compared them with the functions of the Fortnightly CATV systems:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers." (citations omitted) (at 400, 158 USPQ at 6).

Other distinguishing features of broadcasters were added in a footnote. Broadcasters sell their time and facilities to sponsors while CATV's do not. CATV's on the other hand, charge the public for the right to view their offerings; broadcasters do not. Unlike broadcasters, CATV's have no

influence on program content and arrangement. [at 400, n. 28, 158 USPQ at 5, citing Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315, 325, 130 USPQ 127, 135-136 (D. Ida. 1961).].

The Court's application of the functions of broadcasters and viewers provides only the broadest guide to analyzing the function of the CATV systems before us.[8] Fortnightly did not make clear, for example, how many functions common to broadcasters a CATV system must fulfill for it to fall on the broadcaster's side of the line or, indeed, the extent an operation need be carried on for it to be found a "function." Nor does Fortnightly deal with instances where a CATV system simultaneously performs some functions of a viewer and some of a broadcaster, as in the case before us.

Since under Fortnightly's functional analysis test, the Fortnightly CATV systems functioned as viewers and consequently fell on the viewer's side of the line, our approach must be to compare Fortnightly's CATV's with the ones before us in order to isolate the differences between the two. We shall then explore whether those differences, singly or in combination, cause Teleprompter's CATV's to "function" so differently from those in Fortnightly as to place Teleprompter on the broadcaster's side of the line.

At the outset we can dispense with certain minor features of Teleprompter's CATV's that do not effect a significant change in function, though they did not exist in Fortnightly. These features are the use of microwave, interconnection, advertising, and the sale of commercials. Plaintiffs contend that defendants' CATV's are operating like broadcasters by using microwave, since microwave

[8]Justice Fortas stated in his Fortnightly dissent: "The vague 'functional' test of the meaning of the term 'perform' is * * * unsatisfactory." (at 407, 158 USPQ at 8). See also Comment, The Copyright Law and Its Relevance to CATV, 19 Buff, L. R. 65, 81-82 (1969).

transmits signals through the air. Broadcasters propagate signals over-the-air, the argument goes; and since the microwave transmitters used by Teleprompter do also, Teleprompter, we are told, is functioning as a broadcaster. However, a broadcaster sends out signals to the public, while, as we have found, Teleprompter uses microwave to carry signals from one of its facilities to another; no homeowner receives Teleprompter's microwave transmissions. Its use of microwave is thus completely analogous to the use of cable as a connecting carrier. Not every over-the-air transmission of signals by electromagnetic energy is a broadcast, human speech being just one example.

Nor does interconnection of several Teleprompter CATV's with closed-circuit theaters for the Liston-Ali fights make these CATV systems into a broadcast network. This interconnection occurred on two separate, temporary and special occasions. Teleprompter's CATV's were interconnected only in the sense that several of them were linked to the same independent nationwide circuits. Whatever this brief interconnection may portend for the future, it does not transform defendants' present CATV systems into a broadcast network as plaintiffs suggest.

Defendants' advertising efforts are somewhat similar to those of the Fortnightly systems. One CATV system in that case advertised that it afforded access to a greater number of channels than an ordinary antenna. 255 F. Supp. 177, 149 USPQ 758 (S. D. N. Y. 1966).* Teleprompter makes similar contentions about the numbers of otherwise unavailable channels its subscribers can receive.

The unique aspect of Teleprompter's advertising is its mention of programs originated by the CATV; as will be noted below, the Fortnightly systems originated only time and weather scans. We fail to see though how emphasis on its originated programs changes Teleprompter's function.

*United Artists Television, v. Fortnightly Corporation

This type of advertising demonstrates, of course, that Teleprompter felt its unique service would be more attractive to consumers if original programs were offered. But if any change in function occurred because of origination, it was due to the origination itself, not to Teleprompter's advertisement of that fact.

Nor do we find decisive significance in the sale of commercials to accompany Teleprompter's origination of sporting events in New York City. While the Supreme Court described commercial sponsorship as an attribute of a broadcaster, it was listed as merely one of a number of indicia of broadcasting, not as a sole determinant. The sale of commercials in the case before us was small in both the amount of money involved and in relation to the amount of programming carried by the New York CATV. Importantly, these commercials were sold and carried as part of the programming *originated* by Teleprompter, and not in connection with its transmittal of over-the-air broadcasts. Of course, both types of programming were part of the same overall service, and realistically, some of the audience for the commercials was at least partly attracted to Teleprompter by its "reception service." But the commercials were not inserted in the midst of the received programs, and the sponsor seems to have geared the commercials closely to the originated sports events.

We come now to Teleprompter's importation of distant signals—the retransmission of broadcast signals that cannot be received on rooftop or tower-mounted antennas. This function is a salient feature of the Farmington, Great Falls and Rawlins CATV's and is also present in Elmira. It is almost certainly responsible for much of the business of the first three of these systems.

Plaintiffs contend that Teleprompter is engaging in broadcasting by bringing signals into a new locale. In plaintiffs' view, importation of distant signals differentiates

this case from Fortnightly, whose CATV's functioned "merely as an auxiliary antenna to enhance the quality of the television picture* * * " (Plaintiffs' pre-trial brief at 8, 19). Plaintiffs thus urge us to limit the copyright immunity resulting from Fortnightly to those CATV's which "enhance" the quality of picture that can already be received in the locale.

A reading of the Fortnightly opinions of the District Court of Appeals and Supreme Court reveals that the Fortnightly systems did more than "enhance" poor quality pictures—they in fact brought in stations from which usable reception could not be had at all. All of the courts recognized that the Fortnightly CATV's carried broadcasts to *additional* viewers.

Fortnightly involved two CATV's one in and around Clarksburg, West Virginia, and another in and around Fairmont, West Virginia, eighteen miles from Clarksburg. Clarksburg is located approximately 82 miles from Pittsburgh, 57 miles from Wheeling, West Virginia, and 74 miles from Steubenville, Ohio—the cities from which it received broadcast signals. Fairmont, which received the same signals, is 67, 52 and 65 miles from those cities respectively. The Fortnightly systems had antennas on hills above Clarksburg and Fairmont, connected by coaxial cables to individual subscribers.

District Judge Herlands found that:

> "No credible competent evidence was adduced which demonstrated that the residents of Clarksburg or Fairmont, other than the subscribers to defendant's systems, could receive a usable and reasonably satisfactory picture from any of the five stations in Pittsburgh, Wheeling or Steubenville." 255 F.Supp. at 186, 149 USPQ at 765, aff'd 377 F.2d 872, 883 n. 14, 153 USPQ 696, 705-706 (2d Cir. 1967).

Judge Herlands also found as a fact that:

> "The basic purpose of defendant's CATV systems * * * is to process and retransmit signals of a television broadcast station to areas in which direct reception by ordinary home antennas of such television broadcast is unsatisfactory because of distance, intervening topographical conditions, or similar factors." 255 F. Supp. at 196, 149 USPQ at 772.

The Court of Appeals cited Judge Herlands' first finding above in stating that "[t]he hilly terrain in and around Clarksburg and Fairmont makes reception by normal rooftop antennas of television programs broadcast by the Pittsburgh, Steubenville and Wheeling stations difficult or *impossible*." 377 F. 2d 872, 874, 153 USPQ 696, 698 (2d Cir. 1967) (Emphasis added).

The Supreme Court treated the Fortnightly case as one where most residents of the areas involved could not receive broadcasts of other than local stations by ordinary rooftop antennas, 392 U. S. at 391, 158 USPQ at 2. It went on to distinguish CATV systems from broadcasters on the ground that the former "receive programs that have been released to the public and carry them by private channels to *additional* viewers"[9] 392 U. S. at 400, 158 USPQ at 6 (Emphasis added).

It is clear, then, that Teleprompter's importation of signals not receivable on rooftop antennas is no different from that in Fortnightly. This case differs from Fortnightly in that in a number of the systems the antenna tower receiving the signals is located not on a hill over the city but many miles away in the vicinity of the broadcast-

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[9] In United States v. Southwestern Cable Co. 392 U.S. 157, 162 (1968), decided a week before Fortnightly, the Court stated that CATV systems "may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae."

ing station. Farmington, as we have seen, receives Los Angeles stations whose signals are received off-the-air near their point of origination and relayed by microwave to New Mexico. Does this greater distance alone between the receiving antenna and the CATV station and its customers change the function of the Fortnightly reception service? To put the question another way, did the Supreme Court mean to imply a geographical limit beyond which signals could not be imported? Though the Court of course, was concerned with the system before it, which imported signals from a maximum distance of 82 miles, there is no indication that it intended to imply a geographical limit.[10] In fact, the Supreme Court in Fortnightly explicitly declined to make copyright liability dependent on the distance the broadcast signal was carried by a CATV. There the Court said:

> "We have been invited by the Solicitor General in an amicus curiae brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, com-

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[10] Justice Fortas, in dissent, may have understood the majority to have been impliedly limiting the distance signals could be carried when he wrote:

> "It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a 'cooperative antenna' employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves." 392 U. S. at 407, 158 USPQ at 8.

It is also possible that Justice Fortas thought that such a geographical distinction *should* have been made by the majority but was *not*.

munications, and antitrust policy. We decline the invitation.** That job is for Congress. We take the Copyright Act of 1909 as we find it. With due regard to changing technology, we hold that the petitioner did not under that law 'perform' the respondent's copyrighted works."

392 U. S. at 401-402, 158 USPQ at 6. (Other footnotes omitted)

Furthermore, the Court's reasoning in Fortnightly would not support our creation of a difference between signals received on a local tower and signals received on a distant one. "The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer." Id. at 398, 158 USPQ at 4. Here, the "viewer" (the CATV system) has, by supplying more sophisticated equipment, enlarged the effective range of the broadcast, just as the CATV in Fortnightly enlarged the range of broadcasts with its tower on a hill. The Court's description of a CATV in Fortnightly is equally apt for this case: "Essentially a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set." Id. at 399, 158 USPQ at 5. What Tele-

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** The Solicitor General would have us hold that CATV systems do perform the programs they carry, but he would have us "imply" a license for the CATV "performances." This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the "Grade B Contour" of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915. Since we hold that the petitioner's systems did not perform copyrighted works we do not reach the question of implied license.

prompter has done is to make its antenna even more "well-located" and even more "efficiently" connected to a viewer's set than in Fortnightly.

If a viewer erected an antenna on a hill, the Court said, he would not be performing the programs he received. Id. at 400, 158 USPQ at 5. Nor, it would seem, would a viewer be "performing" if he set up a strategically-placed antenna miles from his home and brought in signals from that antenna. The fact that the same operation is conducted here as a commercial enterprise by a viewing innovator does not change its function—which is to "enhance the viewer's capacity to receive the broadcaster's signals." We therefore find that Teleprompter's importation of distant signals does not cause it to function as a broadcaster.

Plaintiffs contend that the importation of distant signals allows defendants greater latitude in program selection and that this latitude makes them more like broadcasters than viewers. We have found that Teleprompter's practice of importing distant signals allowed it to exercise discretion in choosing which distant signals to import. It is not clear from the record what freedom the Fortnightly systems had to select the broadcast stations they would carry. Because they received broadcast signals on a single antenna located near the area it served, the Fortnightly CATV's had less control over program selection than CATV's that would mount antennas near selected broadcast stations in other cities. But, though Teleprompter has greater freedom of choice than Fortnightly, its latitude is not comparable to that of a broadcaster, which controls program content and scheduling.

Perhaps the most striking difference between this case and Fortnightly is Teleprompter's program origination. The Fortnightly CATV's transmitted messages by video scanner and no more. 255 F. Supp. at 197, 149 USPQ at 773-774. The Supreme Court in Fortnightly did not find

this meager origination of significance and explicitly excluded from consideration CATV systems originating their own programs. 392 U. S. at 392 n. 6, 158 USPQ at 2.

Due to the development of the CATV industry, we are here squarely faced with CATV systems that do originate a substantial amount of their own programming. We have found that all the CATV's originate "automatic" transmissions around the clock, and all originate substantive programs to some degree, ranging from a few hours a week in Elmira to seventy hours a week in New York as of March 31, 1971. We have also found that the content of these shows is not significantly different from those of ordinary broadcast stations. As far as we can tell, the volume and variety of program origination by CATV will probably increase in the future. In fact, though we need not decide if it is a defense to potential copyright liability as defendants urge, it is worth noting that the Federal Communications Commission does require non-automatic program origination by most CATV systems. 47 C. F. R. § 74.1111. [11]

We do not doubt that Teleprompter's program origination is similar to that done by broadcasters. These CATV's select the programs, propagate them, and have control over program content and arrangement. Teleprompter's New York system sells commercials for a portion, albeit small, of its originated schedule. Certainly New York originates at least as many hours of programming as many local broadcast stations. With respect to its program origination Teleprompter is functioning as a broadcaster.

We are thus faced with the question of whether a CATV's function as a broadcaster with respect to program origination affects the nature of the function it performs

[11] Teleprompter argues that to find copyright liability because of program origination demanded by the F. C. C. would be unconscionable. Cf. Farmers Union v. WDAY, 360 U. S. 525, 531.

in receiving and re-transmitting over-the-air broadcasts. We are of the opinion that the copyright liability for the "reception service" should not be affected by what can be considered an unrelated function—program origination. It is true that the originated programs and the received programs are sold to subscribers as a package; nobody buys one without the other. But the nature of the function of a CATV with respect to received shows is not changed by the presence of original material on other channels or at other times. What Teleprompter is doing to plaintiffs' copyrighted material, and other over-the-air broadcasts, is the same whether the CATV's originate programs or not. The "function" of the reception service is not changed by simultaneous sale of original shows, just as it would not be changed by Teleprompter's simultaneous delivery of free ice cream or candy to every subscriber.

Having examined the separate activities which plaintiffs feel put defendants on the broadcaster's side of the line, it may be appropriate to look at defendants' systems as a whole. It is somewhat difficult to apply either the term "viewer" or "broadcaster" to the CATV systems in their entirety in this case. As we have already seen, these CATV's perform two functions: 1) delivery of the signals of over-the-air broadcast stations, and 2) transmission of original television programs. It often cannot fairly be said that one is the predominant function. The service sold by Teleprompter is the combination of these functions, not either in isolation.

Beyond the "functional test" we have discussed at length and attempted to apply, it may be that the lesson of Fortnightly is, as the Eighth Circuit Court of Appeals says in another context: "broadcast signals are dedicated to the public." Midwest Video Corp. v. United States, 441 F. 2d 1322, 1326 (8th Cir. 1971), cert. granted, 40

U. S. L. W. 3314 (U. S. Jan. 10, 1972).[12] Certainly, that is one conclusion that can be drawn from the Supreme Court's first finding that the range of a viewer is determined by the equipment of both the broadcaster and the viewer, and then analogizing a CATV to a viewer's antenna. For if a CATV is like a viewer and a viewer by his choice of equipment can determine the range of a broadcast, then there seems to be little limit to what can be done with broadcast signals by CATV's. The result indeed may be that "the right to receive and distribute [signals] may be exercised by any one with the capacity to capture the signals." Id. at 1327.

It should be remembered that our task here is to decide whether what defendants do infringes plaintiffs' exclusive rights under the Copyright Act of 1909, 35 Stat. 1075, as amended, specifically § 1, 17 U. S. C. § 1, by "performing" plaintiffs' copyrighted works. In construing the Copyright Act in the years since 1909 the courts have built on the basic analogy of the producers of a stage play and their audience; the producers perform the play, the audience does not. See 392 U. S. at 395 n. 15, 158 USPQ at 3. This metaphor was then analogized to the dichotomy between a listener and a broadcaster, see e.g. Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F. 2d 411 (6th Cir. 1925); Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191, 201, 9 USPQ 17, 20 (1931), which in turn was used as a model for differentiating a broadcaster from a non-infringing CATV in Fortnightly. We have here carried this analogy yet another step by comparing the instant CATV's with those in Fortnightly. Undoubtedly, future

[12] It has been observed that this result is quite similar to that which would follow from defendants' license-implied-in-law argument. Comment, supra, note 8, at 79-80.

The issue in Midwest Video is whether the Federal Communications Commission has the power to require existing cable television systems to originate programming.

technological change, drastic and otherwise, will see the courts asked to take further steps. Perhaps the time has come to cease piling analogy on analogy and to await word from Congress.

The copyright monopoly is "wholly statutory", White-Smith Music Publishing Co. v. Apollo Co., 209 U. S. 1, 15 (1908), and we should perhaps be reluctant to expand an exception to the general disfavor of monopolies in the absence of a more precise expression of Congressional intent, particularly in light of the considerations of national communications policy that Congress may want to bring to bear on the CATV industry.

In any case, taking the law in its present state, we find that the CATV's before us do not function as broadcasters within the meaning of the Fortnightly test, that they therefore do not "perform" plaintiffs' works, and hence do not infringe their copyrights. We, of course, do not reach any of defendants' arguments other than those considered above.